Supreme Court, U.S.
FILED
JAN 12 1983
ALEXANDER L. STEVAS
CLERK

82-1209
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BREWTON FASHIONS, INC., A DIVISION OF JUDY BOND, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GEORGE G. GALLANTZ
Counsel for Petitioner
300 Park Avenue
New York, New York 10022
(212) 909-7052

ALLAN H. WEITZMAN
MARK L. GOLDSTEIN
PROSKAUER ROSE GOETZ & MENDELSOHN
Of Counsel

QUESTION PRESENTED

Whether a court of appeals applies the correct burden-of-proof test when it concludes that an employer violates Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) if, in a "dual motive" discharge case, when the question is close, it is shown that the "force" of anti-union purpose is "reasonably equal" to the admittedly lawful motive for terminating an employee.

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STATUTES

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Brewton Fashions, Inc., a Division of Judy Bond, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 682 F.2d 918. The decision and order of the National Labor Relations Board (App. B, *infra*) and the decision of the administrative law judge (App. C, *infra*) are reported at 252 N.L.R.B. 1038 (1980).

JURISDICTION

The opinion of the court of appeals was issued August 13, 1982. The petition for rehearing and suggestion for rehearing en banc were denied by order entered October 18, 1982 (App. D, *infra*). The judgment of the court of appeals was issued December 3, 1982 (App. E, *infra*). Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides in part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]. . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

STATEMENT

This petition presents a question closely related to and encompassed in the question presented in *Transportation Management Corp.*, No. 82-168, in which this Court granted certiorari on November 15, 1982. That case, like this one, requires examination of the Board's *Wright Line* test which announced a new burden of proof rule for dual-motive discharge cases. *Wright Line*, 251 N.L.R.B. 1083, 1086-88 (1980).

Before October 1978, petitioner had hired an engineer to improve the efficiency of its blouse manufacturing plant located in Brewton, Alabama. In February or March 1979, the engineer recommended that every trimmer be assigned to load his or her own cart with the trimmed garments and to push it to the sewing room (R. 179-80, 220-23).

Two trimmers, Kathleen Chavers and Grace Boozer, each refused in March 1979 to push the cart alone (Employer's [respondent below] Ex. 17; *accord*, R. 192-93). They claimed that this was "men's work." Petitioner told Chavers and Boozer that their response was unsatisfactory. They persisted in their refusal to perform the jobs assigned to them. On

Friday, March 30, 1979, Chavers and Boozer were told to reconsider their refusal over the weekend and not come back to work if "you're not going to push the buggy." (R. 37) Management then issued formal warnings to Chavers and Boozer (R. 68-69, 269-70, 289).

After their weekend of thinking it over, Chavers and Boozer returned to work on Monday, April 2, 1979, but adhered to their refusals to push their carts despite the repeated requests of their immediate supervisor, Charles Hawkins, that they at least attempt to do the work as assigned. They were told that their supervisor would provide assistance whenever the loads were particularly heavy, but each still refused to try to do the job alone (R. 84-85, 128, 258, 303, 338). They adamantly claimed that pushing the cart was a "man's job . . . that's all there is to it." (R. 258, 328-29; *see also* R. 25, 28, 66, 71, 107-08, 262).

All these events occurred before the beginning of any union activity at the plant. Thus, petitioner could then have lawfully discharged Chavers and Boozer for their insubordinate conduct. Instead, management acceded to the requests of Chavers' and Boozer's immediate supervisor that these long-term employees be given sufficient time to adjust to the new methods.

It first became known to management on April 25, 1979, that an attempt was being made by an employee Pugh to solicit union cards at the Brewton plant (R. 140). There is, however, no concrete evidence in the record that Chavers and Boozer ever actually became union adherents. There is evidence that Chavers and Boozer remained insubordinate.

About June 15, 1979, other employees, male and female, complained to management that Chavers and Boozer were intentionally making a mockery of the system of work assignments (R. 16, 310-11). Management then reluctantly concluded that Chavers and Boozer were destroying employee morale and could no longer be permitted to undermine the effort to increase efficiency and productivity.

On Monday, June 18, 1979, they were asked, once again, if either would push the cart alone. Each refused and they were both discharged (R. 269).

In deciding to enforce the Board's order, the court of appeals said:

> We do not deny that the evidence presents a close question; however, "the Board is not required to establish substantial evidence that conduct is motivated *solely* by anti-union animus. It is sufficient if substantial evidence shows that the force of anti-union purpose was '*reasonably equal*' to the lawful motive prompting conduct," *N.L.R.B.* v. *Aero Corp., supra*, 581 F.2d at 514-15 (emphasis ours), and that discharge would not have occurred in the absence of protected activity. We conclude that the Board has met that standard here.

(682 F.2d at 923).

REASONS FOR GRANTING THE PETITION

Like *NLRB* v. *Transportation Management Corp.*, No. 82-168, in which this Court granted certiorari on November 15, 1982, this case raises an important question concerning the burden of proof in a "dual motive" case in which an employer, charged with having violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), offers evidence—credited by the court below in this case—that it would have discharged the employee for legitimate reasons, absent his or her union activities.

Central to the decision of both *Transportation Management Corp.* and this case is the correctness of the decision of the First Circuit in *NLRB* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The new formulation of the burden of proof in "dual motive" cases, announced by the Board in *Wright Line*, 251 N.L.R.B. 1083 (1980), had not yet been reviewed by the First Circuit when the briefs in this case were filed below.

The Board, in its brief to the court below, discussed in detail the Board's *Wright Line* formulation and argued for its validity, while denying that any "question of dual or mixed

motive" was presented in this case. (Brief below for the NLRB at 16n).

It is true that the Board did dismiss, as pretextual, the substantial evidence that these employees had been discharged for legitimate reasons. But the court below disagreed and found "that the evidence presents a close question." (682 F.2d at 923). However, it resolved that close question by substituting for the Board's finding of "pretext" its own conclusion that the "force" of anti-union purpose was "reasonably equal" to petitioner's admittedly lawful motive. It was undisputed that that lawful motive had existed before the union organization began, and there was substantial evidence that that lawful motive still existed when the employees were ultimately discharged for making a mockery of the employer's assignment system.

Even assuming the correctness of the Board's *Wright Line* formulation, the "reasonably equal force" of the employer's evidence should have been held sufficient to entitle it to a dismissal of the Board's complaint. Instead, the court below, while avoiding any explicit discussion of burden of proof in a dual-motive case, effectively relieved the Board of complying with the unambiguous requirement in Section 10(c) of the Act, 29 U.S.C. § 160(c), that it must prove its case by a "preponderance of the testimony." The effect of the decision is instead to require the employer in a dual-motive case to prove its innocence by a "preponderance of the testimony."

As the Solicitor General demonstrated in his petition for certiorari in *Transportation Management Corp.*, the question thus presented is of great importance in the administration of the Act and has been the subject of conflicting decisions among the Circuits. The Solicitor General cited *Behring International Inc.* v. *NLRB*, 675 F.2d 83 (3d Cir. 1982) as in agreement with the First Circuit in *NLRB* v. *Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982) and decisions of the Sixth, Eighth and Ninth Circuits to the contrary.

Decision by this Court of *Transportation Management Corp.* will thus have a direct bearing on the correctness of the decision of the court of appeals in the instant case.

Certiorari should therefore be granted and, if administratively feasible, this case should be set down for argument together with *Transportation Management Corp.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE G. GALLANTZ
Counsel for Petitioner

ALLAN H. WEITZMAN
MARK L. GOLDSTEIN
PROSKAUER ROSE GOETZ & MENDELSOHN
Of Counsel

January 10, 1983